Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1406

PAUL AND HELENE C. McCARTHY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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2. Did the United States Court of Appeals for the Sixth Circuit have jurisdiction to hear this appeal based upon 28 U.S.C. § 1291 and the Death Knell doctrine as enumerated in *U.S.* v. *Wood,* 295 F 2d 772 (C.A. 5th 1961), and followed and applied by the Sixth Circuit in *Ott* v. *Speedwriting Publishing Co.,* 518 F 2d 1143 (C.A. 6th 1975)?

3. Is the decision of *Catlin* v. *U.S.,* 324 U.S. 229 (1944), applied in *U.S.* v. *Certain Real Estate, etc.,* 217 F 2d 920 (C.A. 6th 1954) dispositive of the issue below?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. ———

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Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Paul and Helene C. McCarthy, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 15, 1978.

OPINION BELOW

The opinion and order of the Court of Appeals appears in the appendix hereto. The opinion and order of the United States District Court for the Southern District of Ohio also appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 15, 1978. Such constitutes a final order. This petition was filed within ninety days from the date of that order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1) and 28 U.S.C. § 2101 (c).

QUESTIONS PRESENTED

I. Was the decision by the Appellate Court for the Sixth Circuit dismissing appeal based upon lack of jurisdiction correct in light of 28 U.S.C. § 1292 giving Appellate Courts jurisdiction to consider appeals from the denial or granting of injunctions?

II. Did the U. S. Court of Appeals for the Sixth Circuit have jurisdiction to hear this appeal based upon 28 U.S.C. § 1291 and the Death Knell doctrine as enumerated in *U. S.* v. *Wood,* CA 5th, 295 F2d 772 (1961), and followed and applied by the Sixth Circuit in *Ott* v. *Speedwriting Publishing Co.,* 518 F2d 1143 (CA 6 1975)?

III. Is the decision of *Catlin* v. *U. S.,* 324 U.S. 229 (1944), applied in *U.S.* v. *Certain Real Estate, etc.,* 217 F2d 920 (6th Cir., 1954), dispositive of the issue presented below?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291

The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the

District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292 (a) (1)

(a) The Courts of Appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court of the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

This case originally arose in 1969 when the Army Corps of Engineers (hereafter referred to as the "Corps") sought a writ of possession for land owned and occupied by the Petitioners Paul H. and Helene C. McCarthy. Petitioners' land was sought in connection with the construction of a water impoundment project known as East Fork Lake, situated in Clermont County, Ohio. Petitioners' land was sought for purposes of shoreline control. After years of litigation in the Federal Court system (specifically the U. S. District Court for the Southern District of Ohio and the United States Court of Appeals for the Sixth Circuit) during which the writ of possession was denied to the Corps, the writ was finally granted and the order issued on July 15, 1976. (Appendix A, pp. 1a-2a). At that time, however, the issue of compensation had yet to be determined. Subsequently, one week after the entry of the order, on July 22, 1976, Petitioners filed a motion for

injunctive relief to prevent the Corps from acting on the order for possession. (Appendix B, pp. 3a-4a). On September 20, 1976, the U. S. District Court for the Southern District of Ohio issued an order denying the motion for injunctive relief. (Appendix C, pp. 5a-6a) and on the same day the Petitioners filed with the U. S. Court of Appeals for the Sixth Circuit a motion to stay pending appeal of the District Court order of September 20, 1976. On October 7, 1976, the U. S. Court of Appeals for the Sixth Circuit denied the motion to stay and on October 15, 1976, the Petitioners asked the Court to reconsider its denial of the motion to stay. On November 15, 1976, the Respondent here, the Appellee there, filed with the Court of Appeals a motion to dismiss based upon a lack of jurisdiction of that Court to entertain the appeal because they contended, it was an attempt to appeal a non-final, non-appealable order. (Appendix D, p. 7a). On January 6, 1977, the Court of Appeals denied the motion of appellees filed on November 15, 1976 (Appendix D, p. 7a). After an extensive length of time and not until August of 1978, was the issue of compensation finally settled. (Appendix E, pp. 8a-9a). On November 30, 1978, the Court of Appeals for the Sixth Circuit heard oral argument on the appeal of Petitioners from the denial of the injunction (filed on September 20, 1976), and on December 15, 1978, issued an order holding they were without jurisdiction to hear the appeal (Appendix E, pp. 8a-9a). It is from that order that Petitioners seek a writ of Certiorari from this Court.

REASONS FOR GRANTING THE WRIT

1. THE SIXTH CIRCUIT COURT OF APPEALS DECISION IS CLEARLY ERRONEOUS. THE DISTRICT COURT ORDER APPEALED FROM WAS CLEARLY A DENNIAL OF AN INJUNCTION AND PROPERLY DOCKETED WITH THE COURT UNDER 28 U.S.C. § 1292 (a) (1).

28 U.S.C. § 1292 (a) (1) permits the appeal of the denial of injunctions and gives the Court of Appeals jurisdiction to hear such matters. The District Court order of September 20, 1976 was captioned "Order Denying Motion for Injunctive Relief" (Appendix C, pp. 5a-6a) and Petitioners' request before the District Court was labeled "Motion for Injunctive Relief" (Appendix B, pp. 3a-4a).

It is clear that the District Court Order of September 20, 1976, entitled "Order Denying Motion for Injunctive Relief" was in fact an order denying injunctive relief.

Even in light of the Supreme Court's decision in *Sampson* v. *Murray*, 415 U.S. 61 (1974), holding that the label put on the order by the District Court is not decisive of the true nature of the order, when the September 20th order is analyzed in relation to the determinative standards set out in *Sampson* v. *Murray*, (i.e., the duration of the order, the presence of notice and hearing, and the type of showing made at the hearing), 415 U.S., at pp. 85-87, and viewed in light of the elements required by the Sixth Circuit to merit the granting of a motion for injunctive relief, see *Roth* v. *Bank of Commonwealth*, 583 F2d 527 (1978), the above conclusion is inescapable.

Roth v. *Bank of Commonwealth*, supra, at p. 537-8, quoting from *Metropolitan Detroit Plumbing and Mechanical*

Contractors Association v. *HEW*, 418 F. Supp. 585 (E.D. Mich., 1976), holds that to justify the issuance of a preliminary injunction, the following factors must be met:

1. a showing of a likelihood of success on the merits,
2. the irreparability of any harm to the Plaintiff,
3. the balance of injuries as between the parties, and
4. the impact of the ruling on the public interest

In this case, each element was clearly met; notice was given to the United States, a hearing was held and Petitioners' motion spoke to irreparable harm and the lack of an adequate remedy at law together with consideration of the public interest. Clearly Petitioners' motion was one seeking injunctive relief. Applying the rationale of the *Murray* decision, "a district court, if it were agreeable to shield its orders from appellate review merely by designating them as (one for reconsideration of the order for delivery of possession) would have virtually unlimited authority over the parties in an injunctive proceeding."

Applying the principles of *Sampson* v. *Murray*, supra, and *Roth* v. *Bank of Commonwealth*, supra, there can be no question but that the Petitioners' motion of July 22, 1976 was indeed a motion for injunctive relief. The motion itself was styled as such. (Appendix B, p. 3a) The transcript of the proceedings at the District Court level of August 4, 1976, before Judge Timothy S. Hogan, shows even more clearly that the motion of July 22, 1976 was in the nature of a hearing on a motion for injunctive relief. At TR p. 3, lines 7-17, the Court recognizes that the July 22 motion was a motion seeking injunctive relief. At TR p. 42, lines 8 & 9; 20 & 21, the Court specifically rules that the denial will operate as the denial of a motion seeking injunctive relief.

Counsel for Mr. McCarthy repeatedly addressed the issue of irreparable harm and the effect on the public interest, and the likelihood of success on the merits. See TR p. 16, lines 19-20; TR p. 17, lines 10-14, TR pp. 36-37, lines 18-25; 1-15; TR p. 40, lines 3-10. In addition, the Court itself addressed the issues of irreparable harm and the public interest. See TR p. 40, line 25; TR p. 41, lines 1-14; TR p. 42, lines 2-6.

The conclusion that the District Court Order of September 20, 1976 entitled "Order Denying Motion for Injunctive Relief" is exactly that is inescapable.

2. THIS CASES RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In its order of December 15, 1978, the Court of Appeals for the Sixth Circuit based its dismissal for lack of jurisdiction upon the case of *Cat''n* v. *U.S.*, 324 U.S. 229 (1944), and the rule enunciated therein that:

> ordinarily, in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case and adjudicating all rights, including ownership and just compensation, as well as the right to take property (at p. 233)

The Sixth Circuit applied the same rule in *U.S.* v. *Certain Real Estate, etc.*, 217 F2d 920, 927 (6th Cir., 1954). The decision in *Catlin* rested upon what the Court considered a final decision under § 128 of the judicial code (28

U.S.C. § 225 (a)) and thus appealable. The decision in *U.S.* v. *Certain Real Estate, etc.*, also rested upon a definition of what constituted a final decision under § 128 of the Judicial Code, (§ 1281, Title 28, U.S.C.) as established by *Catlin*.

It should be noted at the outset that both decisions were rendered long before the origin of what is commonly known as the "Death Knell" doctrine, as enunciated in *Eisen* v. *Carlisle & Jacquelin*, 370 F2d 119 (1966); cert. denied 386 U.S. 1035 (1967); 391 F2d 555 (1968), 52 F.R.D. 253 (1971); 417 U.S. 156 (1973); permitting appeal where a court decision, while not generally heretofore within the realm of finality as contemplated by § 1291 of Title 28, U.S.C. has such affect of finality, so as if not reviewed to toll the death knell of the action, and for all practical purposes, terminate the litigation. See *Eisen*, supra, at 120-121.

In support of the rule of finality as governing appealable issues, it has been stated that:

> the foundation of the policy which limits review to "final decisions" is one against piece meal litigation, with consequent dissipation of judicial energy and delay.
>
> — *Catlin* v. *U.S.*, 324 U.S. 229, at 233-34

However, as early as 1961, courts have recognized the undue hardship worked by a strict application of this rule upon parties to an action in certain situations and have permitted the appeal of certain orders not traditionally treated as final and therefore appealable orders under 28 U.S.C. § 1291. Thus,

> an order, otherwise non-appealable, determining substantial rights of the parties which will be irreparably lost if review is delayed until final judgment may be appealed immediately under § 1291.
>
> — *U.S.* v. *Wood*, 295 F2d 772, 778 (CA 5th 1961); cert. denied 369 U.S. 850 (1962)

The Court recognizes that the determination of finality requires a practical construction and pragmatic approach. See *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 150 (1964); *Brown Shoe Co.* v. *U.S.*, 370 U.S. 294 (1962). Further, the deciding question of finality is one which requires the consideration of two competing interests:

1. the inconvenience and cost of piecemeal review, and
2. the danger of denying justice by delay on the other

— *Gillespie* v. *U.S. Steel Corp.*, supra, at p. 153 citing *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1949)

and that while consideration must be given to repetitive judicial consideration of the same questions, consideration of the same questions must also be given to the need for present judicial review. *Brown Shoe Co.* v. *U.S.*, supra, at p. 309.

Moreover, appeal will be permitted

> prior to completion of (the) whole litigation when failure to do so would preclude any effective review *or would result in irreparable injury* (emphasis added)
>
> — *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 441 (1956)

Thus, appeal was permitted under § 1291 even though a traditional final order was not in question in *Gillespie* v. *U.S. Steel Corp.*, supra, where the Court found that

> delay of perhaps a number of years (in having the brothers and sister rights determined) might work a great injustice on them (since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands) (parenthesis added)
>
> — at page 153

Thus, where review is permitted in areas which have not been traditionally considered final orders under § 1291, the primary concern is the possibility of irreparable harm should review be denied. See *Forgay* v. *Conrad*, 47 U.S. 201 (1848), where the Supreme Court held appealable, based upon the possibility of irremediable injury, an order of the court below requiring immediate delivery of property. See also *Carondelet Canal and N. Co.* v. *Louisiana*, 233 U.S. 232 (1913). The Supreme Court, upon analyzing those cases in *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945), speaking through Mr. Justice Frankfurter, found the "rationale of those cases to be that a judgment directing immediate delivery of physical property is reviewable . . .", 326 U.S. at p. 126[1]

[1] It should be pointed out that those cases concerned the review of state court orders in a multiple issue litigation framework where review was granted because the issue was considered independent of, and unaffected by, (the) other litigation with which it happened to be entangled.

This situation, then, is distinguishable in that the order below was from a Federal District Court. However, this distinction cannot be held to be determinative in that the U. S. Supreme Court possesses the authority to hear appeals from both state and federal courts.

However, it can be argued in support of Petitioner McCarthy's position and within the realm of the above independent issue or "collateral orders" doctrine of finality, as set out in *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69, 1221 (1949), that the question of finality as discussed in *Catlin* v. *U.S.*, 324 U.S. 229 (1944), as being dependent on not only an order for delivery of possession but also on just compensation, involved, as in *Forgay* and *Carondelet*, an

This case, then, is both distinguishable from the authority relied on by the United States and the Sixth Circuit Court of Appeals in its decision,[2] and falls squarely within the rationale of those cases dealing with permissable appeal because of the threat of irreparable injury or because the order has the practical effect of terminating the litigation.

In addition to the distinguishing reasons cited in f.n. 2, *Catlin* is distinguishable from the Petitioners' situation in that *Catlin* involved a taking under the War Purposes Act of 1917 which "contemplated emergency action," 324 U.S. at 235, and if immediate appeal were to be permitted the purpose of the act would be largely defeated. See 324 U.S. at 235. Additionally, judgment in *Catlin* was entered "ex parte, prior to service of process or publication of notice." See 324 U.S. at 239. Here, the order for delivery of possession issued after notice and extensive hearings in the Federal Court system,[3] under circumstances which clearly did not indicate the necessity of emergency action.

This situation falls squarely within the justifying ra-

issue of multiple litigation "allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." 326 U.S. 120, at 126. In this sense, the cases are indistinguishable.

[2] The cases cited in *Catlin* for the proposition that in eminent domain cases appeal is not proper until the issue of compensation is determined because of the threat of piece meal litigation, i.e., *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U.S. 251 (1916); *Luxton* v. *North River Bridge Co.*, 147 U.S. 337 (1892) (see, in general, footnote no. 8, *Catlin* v. *U.S.*, at p. 234) like *Catlin*, are all cases which arose prior to the birth of the Death Knell doctrine, which proposition the Petitioners herein rely upon as reason for this court to grant their request for Certiorari.

[3] Inception of the case, 1970, issuance of order for delivery of possession, 1976.

tionale for permitting appeals of orders not heretofore traditionally considered final. See *U.S.* v. *Wood,* 295 F2d 772 (CA 5th 1961); *Gillespie* v. *U.S. Steel Corp.,* 379 U.S. 150 (1964); *Brown Shoe Co.* v. *U.S.,* 370 U.S. 294 (1962); *Dickinson* v. *Petroleum Conversion Corp.,* 338 U.S. 507 (1949); *Sears, Roebuck and Co.* v. *Mackey,* 351 U.S. 427 (1956); *Forgay* v. *Conrad,* 47 U.S. 201 (1848); *Carondelet Canal & N. Co.* v. *Louisiana,* 233 U.S. 362 (1913); *Radio Station WOW* v. *Johnson,* 326 U.S. 120 (1945); *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949).[4]

The Petitioners here were required to wait approximately two years between the time of the issuance of the order granting posssion and final determination of just compensation. During that time they were forced to vacate the premises they had previously occupied. Surely this constitutes the irreparable harm contemplated by cases such as *Forgay* v. *Conrad,* supra, and *Sears, Roebuck and Co.* v. *Mackey,* supra, and the cases cited above consistent therewith.

[4] Petitioner is well aware of this Court's latest statement on the Death Knell doctrine in *Coopers and Lybrand* v. *Livesay,* 98 S. Ct. 2454 (1978). The holding of that case specifically dealt with the appealability under § 1291 of orders relating to class certification, in which event the Court held such an order denying class status does not necessarily impede the right to bring the action or spell the end of the action. This case is clearly distinguishable primarily because of the status of the case at the time of the denial of the order appealed from; for clarification, see footnote no. 3, above.

3. THIS PROBLEM IS A COMMON AND EXTENSIVE PROBLEM SHARED BY MANY PERSONS WHOSE LAND HAS BEEN CONDEMNED AND APPROPRIATED, FORCING THEM OUT OF POSSESSION.

In the year 1976, 2,958 land condemnation cases were filed by the United States as Plaintiff throughout the country.[5] As of June 30 of that year, 3,278 cases were pending.[6] In 1977, 2,730 new cases were filed and as of June 30 of that year, 4,420 were pending.[7] The median range of time from filing to disposition of land condemnation cases for the twelve month period ended June 30, 1977, in all of the U.S. District Courts, was nine (9) months and over 10% take at least on the average of 29 months.[8] As of June 30, 1977, the statistics concerning the length of time for which land condemnation cases had been pending, were as follows: (for the Sixth Circuit), a total of 332 cases were pending, 145 of these were for less than one year; 37 were from one to two years; 27 were from 2 to 3 years and 123 had been pending for more than three years. This latter figure comprised 37% of the total of 332.[9] The total percent of pending cases over three years old for all districts was 12.6%.[10]

[5] See Reports of the Proceedings of the Judicial Conference of the United States, March 10-11, 1977 and September 15-16, 1977. Annual Report of the Director of the Administrative Office of the United States Courts, 1977. U.S. Government Printing Office, Washington, D. C., 20402. Stock no. 028-004-00014-1.

[6] Ibid

[7] Ibid

[8] Ibid, at Table C 5B, page 343.

[9] Ibid, Table C 6B, p. 347

[10] Ibid, at p. 346

In a recent conversation[11] with Mr. William Collins of the Department of Justice, I posed the question as to the amount of time, on the average, which elapses between the time of the issuance of the order for the writ of possession and the time of the final determination of just compensation. In his return call of February 27, 1979, he stated the following statistical facts:[12]

As to the date of the taking and the date of trial in 28 trials in Southern Ohio; a few were tried within one and one-half years after filing; a few were tried as long as five to six years after filing; the majority were tried within three years after filing.

Thus it is clear that the hardship and loss borne by the Petitioners is not unique to them alone, but is a hardship imposed on a large number of individuals whose land is the object of condemnation proceedings instituted by the Government.

CONCLUSION

The United States Court of Appeals for the Sixth Circuit had jurisdiction to hear Petitioners' appeal from the denial of the motion for injunctive relief of July 22, 1976, pursuant to the authority granted them under 28 U.S.C. § 1292 (a) (1).

In addition to, or in the alternative, the Sixth Circuit Court of Appeals had jurisdiction to hear the appeal under 28 U.S.C. § 1291, and the application of the Death Knell doctrine as enunciated in *U.S.* v. *Wood,* 295 F2d 778 (CA

[11] Phone conversation of February 26, 1979

[12] As conveyed to my office after checking with Mr. Collins

5th, 1961), and *Eisen* v. *Carlisle and Jacquelin,* 370 F2d 119 (1966), Cert. denied 386 U.S. 1035 (1967); 391 F2d 555 (1968); 52 F.R.D. 253 (1971); 417 U.S. 156 (1973).

The law with respect to appealability in the area of condemnation was established at least 17 years prior to the inception of the Death Knell doctrine;[13] the case of *U.S.* v. *Certain Real Estate, etc.,* 217 F2d 920 (1954), cited by the Sixth Circuit in support of its position, arose at least six years prior to the doctrine's origin. The U. S. Supreme Court has not considered the question presented by those cases since the birth of the Death Knell doctrine. In no area do the equitable considerations comprising the foundation of that doctrine have more applicability than in the area of land condemnations. This question must be settled by this court.

Respectfully submitted,

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[13] Depending on whether one attributes its birth to the case of *U.S.* v. *Wood,* supra, or *Eisen* v. *Carlisle* & *Jacquelin,* supra.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL NO. 7769
Tract No. 343

UNITED STATES OF AMERICA,
Plaintiff,

vs.

247.37 ACRES OF LAND, MORE OR LESS, SITUATE IN CLERMONT COUNTY, STATE OF OHIO, AND ANTHONY J. TRASSER, ET AL., AND UNKNOWN OTHERS,
Defendants.

ORDER FOR DELIVERY OF POSSESSION

(Filed July 15, 1976)

This cause came on to be considered upon the renewed motion of plaintiff for an order of possession of Tract No. 343, as described in the Complaint and Declaration of Taking heretofore filed in this proceeding; and, for reasons set forth in this Court's Order of June 14, 1976, the Court has determined that said motion should be granted.

It is therefore ORDERED that all defendants to this action and all persons in possession or control of the property described in Tract No. 343 herein shall surrender

possession thereof to the plaintiff forthwith or at such time hereafter as may be separately agreed to and authorized by plaintiff.

Effective this 15th day of July, 1976.

/s/ T. S. HOGAN
Chief Judge,
United States District Court

APPROVED:

WILLIAM W. MILLIGAN
United States Attorney

/s/ JAMES E. RATTAN
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Room 200, Federal Building
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Columbus, Ohio 43215

[CERTIFICATION OMITTED]

APPENDIX B

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL No. 7769 Tract 343
Paul H. & Helene C. McCarthy

MOTION FOR INJUNCTIVE RELIEF

(Filed July 22, 1976)

Clerk Of Court
U. S. District

Defendant petitions and prays for immediate Injunctive Relief from Order Of Possession as directed by the Honorable Judge Timothy Hogan on June-14-1976 in the United States District Court. Defendants appeal is supported by reason of Judge Hogans previous self removal from this litigation on grounds of conflicting interest and in concert with a biblical quotation from Deutronomy.

Defendant further prays that their inclusion in CIVIL No. 8892 and 8893 which are combined and entered in the U.S. District Court in addition to CIVIL No. 76-1129 of the U.S. District Court Of Appeals be considered as an instrument for a legal opinion.

Order of Taking was previously denied by Judge Hogan to the United States for not having complied with the NATIONAL ENVIRONMENTAL POLICY ACT of 1969 but which has since been dissolved.

Present appeals in both Courts and which are to be heard on merits has full support of the FEDERAL WATER POLLUTION CONTROL ACT OF 1972.

This Act is equal to or even more enforceable than the 1969 requirements and should thus shelter the Defendant until the Merit Hearings are concluded.

This accelerated Order Of Posession is both unnecessary and discriminatory and will inflict a cruel, unjust and irrevocable hardship on the Defendant.

Therefore the Plaintiff (The United States) should be denied this action pending the Courts opinion and decision. Immediate and necessary Injunctive Relief is hereby sought from this Court.

Signed on this 22nd. day of July-1976

/s/ PAUL H. McCARTHY
/s/ HELENE C. McCARTHY

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL NO. 7769
Tract No. 343
(Paul H. & Helene C. McCarthy)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

247.37 ACRES OF LAND, MORE OR LESS, SITUATE IN CLERMONT COUNTY, STATE OF OHIO, AND ANTHONY J. TRASSER, ET AL., AND UNKNOWN OTHERS,
Defendants.

ORDER DENYING MOTION FOR INJUNCTIVE RELIEF

(Filed September 20, 1976)

This cause came on to be heard on motion of defendants, Paul H. and Helene C. McCarthy for injunctive relief from the order for delivery of possession of Tract No. 343, as described in the Complaint and Declaration of Taking in this proceeding, to plaintiff, the same having been signed by the Court and filed herein on July 15, 1976; and, treating the subject motion as one for reconsideration

of the order for delivery of possession and upon consideration thereof together with the arguments of counsel and defendant, Paul H. McCarthy in his own behalf, the Court finds said motion should be, and it is ORDERED that the same hereby is, denied, to all of which the defendants Paul H. and Helene C. McCarthy except.

/s/ TIMOTHY S. HOGAN
Chief Judge, U. S. District Court

APPROVED:

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-2487

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

247.37 ACRES OF LAND, ETC.
Defendants-Appellants

ORDER

(Filed January 6, 1977)

This matter having been submitted on a motion to dismiss the appeal filed pursuant to Rule 8, Rules of the Sixth Circuit, and it having been concluded that said motion is not well taken, it is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk of Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-2487

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PAUL H. and HELENE C. McCARTHY,
Defendants-Appellants.

ORDER

(Filed December 15, 1978)

Before: KEITH, MERRITT, Circuit Judges and GREEN, District Judge.*

This case involves a long-standing dispute between appellants and the federal government relating to an Army Corps of Engineers dam and impoundment lake project in Clermont County Ohio. Unhappy over government efforts to condemn their property, appellants have attempted to appeal from an order in the district court below granting possession of a tract of their land to the government. We are without jurisdiction to hear this appeal. ". . . ordinarily in condemnation proceedings appellate review may

* Honorable Ben C. Green, Senior Judge, United States District Court for the Northern District of Ohio, sitting by designation.

be had only upon an order or judgment disposing of the whole case and adjudicating all rights, including ownership and just compensation, as well as the right to take the property." *Catlin* v. *United States,* 324 U.S. 229, 233 (1944), *applied in,* e.g. *United States* v. *Certain Real Estate, etc.,* 217 F.2d 920, 927 (6th Cir. 1954).

The appeal is dismissed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Supreme Court, U. S.
FILED
MAY 1 1979
MICHAEL RODAK, JR., CLERK

No. 78-1406

In the Supreme Court of the United States

OCTOBER TERM, 1978

PAUL AND HELENE C. MCCARTHY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

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PAUL AND HELENE C. McCARTHY, PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 8a-9a) is unreported. The order of the district court is also unreported (Pet. App. 5a-6a).

JURISDICTION

The judgment of the court of appeals was filed on December 15, 1978 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on March 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether an order granting the United States possession of condemned land is appealable.

2. Whether the challenge to the validity of the order of possession is now moot because the United States has satisfied the final judgment of just compensation, and petitioners have vacated the property.

STATEMENT

On December 3, 1970, the United States filed a complaint in condemnation and a declaration of taking, pursuant to the Declaration of Taking Act, 40 U.S.C. 258a *et seq.*, covering 39.26 acres in Clermont County, Ohio, owned by petitioners Paul and Helene C. McCarthy. The land was needed in connection with the East Fork Reservoir project of the Army Corps of Engineers. That project was authorized by the Flood Control Act, 33 U.S.C. 701 *et seq.*, and was designed to provide flood control, water supply, water quality, and recreational benefits. On January 19, 1971, the district court entered judgment on the declaration of taking and granted the United States an order for possession of the property.

On September 19, 1971, on motion of the petitioners, the district court vacated the order of possession entered January 19, 1971. The district court reasoned that the Corps of Engineers had not been shown to have fully complied with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, in relation to the East Fork Reservoir project, and that possession by the United States was therefore inappropriate. The district court denied renewed motions for possession on January 24, 1972, and July 24, 1972.

On July 20, 1973, the State of Ohio filed suit challenging the East Fork Reservoir project on NEPA grounds and obtained a preliminary injunction against further construction of the project. *State of Ohio ex rel. Brown* v. *Callaway*, 364 F. Supp. 296 (S.D. Ohio 1973), aff'd and modified, 497 F. 2d 1235 (6th Cir. 1974). The petitioners, Paul and Helene McCarthy, were permitted to intervene in that action to pursue water quality issues under the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. 1251 *et seq.* A supplemental environmental impact statement was issued in 1974 by the Corps, and the State of Ohio dismissed its action on March 28, 1975.[1]

On June 14, 1976, an opinion and order of the district court in the condemnation action held that the Corps had demonstrated compliance with NEPA and included rulings concerning the date of taking and the propriety of an order of possession. On October 29, 1976, the district court certified the opinion and order for an interlocutory appeal pursuant to 28 U.S.C. 1292(b). The court of appeals, however, denied permission to appeal (6th Cir. No. 78-8221).

Meanwhile, on July 15, 1976, the district court entered an order granting the government possession of the property (Pet. App. 1a-2a). The petitioners, acting pro se, filed a "motion for injunctive relief" from the district court's order on July 22, 1976 (*id.* at 3a-4a). This motion attacked the order of possession on the ground that the Corps had not fully complied with NEPA and the FWPCA (*ibid.*). Construing the motion for injunctive relief as a motion to reconsider the possession order, the district court held a hearing and denied the motion (*id.* at 5a-6a). The petitioners filed a notice of appeal from the denial of the motion for injunctive relief.[2]

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[1]Petitioners and other intervenors in *State of Ohio ex rel. Brown* v. *Callaway* sought a new preliminary injunction to halt construction of the East Fork Reservoir project on September 12, 1975. The district court denied their motion on October 8, 1975, and the Sixth Circuit dismissed an appeal from this denial as moot on January 4, 1977 (No. 76-1129). On October 20, 1977, the district court granted summary judgment in favor of the Corps of Engineers. Civ. No. 8892 (S.D. Ohio). No appeal was taken from this judgment.

[2]The petitioners also filed, in the court of appeals, two motions for stay pending appeal; one before the notice of appeal was filed, No. 76-8158; and one after, No. 78-8185. Both were denied by the court of appeals.

The court of appeals denied the motion of the United States to dismiss the appeal for lack of appellate jurisdiction on January 6, 1977 (Pet. App. 7a). After full briefing and oral argument, however, the court of appeals issued an order dismissing the appeal on December 15, 1978 (*id.* at 8a-9a). The court reasoned that the appeal was governed by *Catlin* v. *United States,* 324 U.S. 229 (1945), which held that appeals in condemnation cases were to be had on the final judgment disposing of the whole case. The present petition for a writ of certiorari is from the order dismissing the petitioners' appeal.

While the appeal was pending in the Sixth Circuit, the petitioners vacated the property. Agreement was reached between the parties that $40,000 constituted just compensation for the taking, and, on December 12, 1977, a judgment on stipulation was entered in the district court (Addendum I). The United States paid the deficiency into the registry of the district court, and an order of final distribution was entered on October 16, 1978 (Stip. Addendum II). Proceedings on all the tracts comprised in *United States* v. *247.37 Acres in Clermont County, Ohio,* Civ. No. 7769 (S.D. Ohio), have been completed. There has been no appeal from the final disposition of this condemnation proceeding.

ARGUMENT

The petition should be denied because the case is moot and the decision of the court of appeals is correct.

1. This petition seeks to review a decision of the court of appeals that an interlocutory order of possession in a condemnation proceeding is not an appealable order. During the pendency of the appeal in the Sixth Circuit, however, final judgment was entered in the underlying condemnation action. No appeal has been taken from that final judgment. Title is now

indefeasibly vested in the United States, and the petitioners have been awarded just compensation. As there is no longer an active or live controversy between the parties, this Court could render only an advisory opinion on the issue of which review is sought. See *Hall* v. *Beals,* 396 U.S. 45, 48 (1969); *City of Los Angeles* v. *Davis,* No. 77-1553 (March 26, 1979), slip op. 5-6.

2. In *Catlin* v. *United States,* 324 U.S. 229 (1945), this Court held that a judgment on a declaration of taking under the Declaration of Taking Act, 40 U.S.C. 258a, and an order granting possession in a condemnation proceeding were not final judgments for the purposes of appellate jurisdiction. In particular, this Court ruled that challenges to the validity of the taking were not foreclosed by such orders, and that the landowners retained their rights to pursue such issues on an appeal from the final judgment. *Id.* at 243.

The Sixth Circuit correctly held *Catlin* to be dispositive of the appeal in this case. Petitioners resisted the order of possession on the ground that the taking was invalid for failure to comply with environmental statutes. The district court's adverse ruling on that issue was clearly a proper subject of an appeal from the final judgment in the condemnation action.

Petitioners have attempted to characterize their appeal as one from a denial of a preliminary injunction within the jurisdictional grant of 28 U.S.C. 1292(a). The motion for injunctive relief, however, was directed to the district court's previous order granting possession to the United States. The court correctly characterized the motion as one for reconsideration of the order of possession. As such, the denial of the motion is clearly unappealable under *Catlin.* See

United States v. *687.30 Acres of Land Etc., State of Neb. (Winnebago Tribe)*, 514 F. 2d 667, 670 (8th Cir. 1971).

The petitioners also suggest that the "death knell" doctrine, developed by several courts of appeals since *Catlin*, had undermined the validity of that decision. But the "death knell" doctrine has been rejected by this Court. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). As this Court noted in *Livesay*, 28 U.S.C. 1292(b) provides the appropriate procedure for interlocutory appeals of nonfinal orders. 437 U.S. at 474-475. See *2953.15 Acres of Land, More or Less, Russell County, Ala. (Bickerstaff)* v. *United States*, 350 F. 2d 356, 358 (5th Cir. 1965); *United States* v. *365.0 Acres of Land, Augusta County. Va. (Brady)*, 428 F. 2d 459 (4th Cir. 1970).[3] Petitioners did not invoke that procedure here, and their appeal was therefore properly dismissed.

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[3]Courts of appeals have also permitted interlocutory review in condemnation actions in instances where the policy against piecemeal appeals would not be compromised. In *United States* v. *Certain Land in the Borough of Manhattan (Foley Square)*, 332 F. 2d 679, 680 (2d Cir. 1964), the court took jurisdiction of an appeal from an order of possession raising only collateral issues which would not be presented on a final appeal. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). And in *Loughran* v. *United States*, 317 F. 2d 896 (D.C. Cir. 1963), the court permitted an interlocutory appeal where the validity of the taking could not be challenged on an appeal from a final order because the property was to be transferred to an international organization. In other cases, courts of appeals have found it appropriate to review, by way of mandamus, interlocutory orders in condemnation proceedings where the district court has exceeded its jurisdiction, *United States* v. *Cobb*, 328 F. 2d 115, 117 (9th Cir. 1964); *In re United States*, 257 F. 2d 844, 846 (5th Cir.), cert. denied, 358 U.S. 908 (1958), or where the district court had not followed appropriate procedures. *United States* v. *58.16 Acres of Land (Cooley)*, 478 F. 2d 1055, 1061 (7th Cir. 1973). None of these exceptional facts is involved in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1979

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*The Solicitor General is disqualified in this case.

DOJ-1979-04